SENATE HIGHWAYS AND TRANSPORTATION
EXHIBIT NO. 5
DATE: 2/19/09
BILL NO. SB 408

CRITIQUE ON SB 408

The State of Montana commenced regulating motor carriers of passengers and property in 1931. When the federal government passed the federal motor carrier act in 1935, the state continued to regulate intrastate operators of motor carriers for hire, but acceded to federal preemption of regulation of interstate operations within the borders of the various states and between the states. Thus federal preemption of for hire motor carrier operations is not a new event in the history of Montana, and Montana's recognition of such preemption and cooperation with it has previously occurred.

Here we have a reaction to a preemption by the federal government of the regulation of charter passenger bus operations in the United States. The preemption is a fact not only evidenced by congressional action, but also recognized and upheld by various federal courts.

In Montana charter operations preempted by the federal government have been conducted by a number of charter operators for all of the period of time that the preemption has existed. Until now no one has been particularly upset concerning such operations. Suddenly certain operators who provide regulated taxi and limousine service for hire have become exercised over the commencement of a charter operation being conducted for the most part in the Gallatin Valley area and more specifically between the airport at Belgrade, Montana and various points in the Gallatin Valley. The operation also involves services between the airport and points as far as West Yellowstone, Montana. Regulations of these operations, if properly conducted, are preempted by the federal statutes and acts of Congress and are exempt from regulation by the Public Service Commission of the State of Montana. The new operator of the charter service, Montana Motor Express, is not the only motor carrier for hire offering such service. There are other operators who are offering charter passenger service operations in Montana and who have been doing so since 1998 when the preemption statutes were enacted by Congress.

The legislation proposed by limousine and taxi operators in SB 408 is the obvious result of a reaction to a recognition that preemption exists.

SB 408, is an unnecessary draconian reaction to an existing circumstance not created by the Montana Public Service Commission and only subject to remediation through federal congressional action. The bill seems aimed at some form of creation of more enforcement activity on the part of the Montana Public Service Commission. We suggest that the Montana Public Service Commission can only enforce the existing Motor Carrier Act to the extent that the Montana Legislature provides funding for enforcement activities and officers whose powers and duties are set forth in the Motor Carrier Act. The Legislature

has been seriously deficient in providing funds for such activity through proper appropriations. We suggest that the best way to cause a step up in enforcement activities on the part of the Public Service Commission in Montana is to give the PSC the tools to work with.

Before reviewing the bill one should review the report which has been distributed by the Public Service Commission under date of July 22, 1998. A copy of that report is attached to this critique. It notes the passage of the federal "Transportation Act for the 21st Century" and its resulting federal preemption of "charter bus transportation".

As to SB 408 we have the following comments:

(a) Any provision of any enactment seeking to regulate "charter bus transportation" wouldbe unconstitutional. Attached are several federal court cases which have discussed this issue and have reached the unescapable conclusion that local "state or municipal" attempts to regulate this form of transportation are unconstitutional.

(b) Line 22, page 1 - New Section 1 -

This seems to set up a new system of penalties in addition to the existing statutory provisions for penalties in Section 69-12-108, which provides civil and criminal penalties for violations of up to $1,000.00. This new section would up these penalties to a maximum of $3,000.00 and would multiply those penalties by multiplicity so that a violation could have 25 or more incidents and a fine of $500.00 up to $3,000.00 per incident or $12,500.00 to $75,000.00 in a single day's activity. This is a draconian penalty.

Advertising is included as a violation. If an unsuspecting individual put an advertisement in a radio or newspaper the multiplicity of the offense is obvious. There is no provision for "setting the penalty to fit the violation". The penalty is set so that it applies all or nothing at all.

This section is redundant to the present penalty statute that appears in the Motor Carrier Act.

(c) New Section 2 - Line 4 et seq. page 2 -

This section seeks to create regulation by the PSC of the employment and qualifications of "chauffeurs" by any class A or class B motor carrier for hire carrying passengers. This regulatory function is now conducted by other agencies such as the Department of Transportation. It is redundant and unnecessary.

Subsection (3) is out of place in this section. It relates not to "chauffeurs" but to "geographical operations".

(d) New Section 3, line 19 -

This section would require any privately owned limousine in the state not regulated by the PSC to display a "not for hire" sign in four places on the vehicle.

Can you imagine a private owner of a limousine having to adhere to this. Can you imagine the Public Service Commission regulating all privately owned limousines in the state. Can you imagine hotels, resorts, et al having to conform to this requirement. This would also apply to businesses who would like to place a logo on the exterior of a limousine that they might operate. Private owners could be subject to up to $30,000.00 et al and fines in connection with this regulation. This could also cover vehicles owned by Hertz - Enterprise et al.

(e) New Section 4, Line 27 - This would place rental car companies under Public Service Commission regulatory control. This also would place retail automobile agencies and repair shops under regulatory control. From time to time such businesses have occasion to rent cars with a company driver to handle transportation of customers to and from homes et al and to or from locations where accidents or breakdowns may have occurred.

(f) Section 5, Line 2, page 3 - Amendment to 69-1-114. Don't understand why the diversion of fees is provided for and where they are diverted to.

(g) Section 6, Line 8, page 3 - definitions - (1) The definition of "airport shuttle service" is not realistic. It would cover all service to or from an airport by taxis, most limousines, small buses, whether it is a true shuttle service or not. Shuttle service is defined elsewhere as a repetitive service between main points that occurs on a continuing basis. (4) Again seeks to regulate "chauffeur" employment–redundant. (7) The definition of the term "firm" is contrary to common usage and unnecessary. (10) This subsection completely changes the definition of "household goods". It may mean the same as the existing statute but why change it. Household goods carriers will be very disturbed by this activity. Also the service must be "pre-arranged". Thus there could be no "curb side pickups". (11) Any vehicle stretched to accommodate up to 32 passengers is certainly more than a limousine. (12) This is a partial description of charter service. Limousines apparently want to engage in transportation service covered by federal preemption without realizing that they would become involved in that

activity. (19) and (20) Taxicabs had better read this section carefully–it provides they cannot carry more than 5 passengers - they probably could not do "curbside" business - only "call and demand" business - they couldn't set up the interiors of their cabs to fit their own service needs - it sets up only one method of charging for service - could not have applicable tabs to fit circumstances. It severely restricts taxicab operations. (21) and (22) - this would throw a severe crimp in the "trolley bus" operations conducted by various cities for tourist purposes et al in such places as Helena, Butte, et al.

(h) Section 11 - page 7, Line 15 - sets up new classifications of class B passenger motor carrier service which further divides the kind of service that could be applied for. Again this is unnecessary - under the existing statutes the applicant can apply for a specific kind of service if he desires to do so and there is no sense upsetting the present Motor Carrier Act in order to provide this type of choice factor. - Also it provides for an application fee of $1,000.00 which is not refundable which is draconian and excessive and truly not necessary.

(i) Section 12 - at Lines 8 through 14 on Page 9 of the bill - These provisions are covered by other statutory provisions in the existing Motor Carrier Act that require the Commission to take into consideration the existence of present service and the effects that new service would have upon present service and provides for the capability of motor carriers who now have authority to protest new applications. This is redundant and not necessary.

(j) Section 13 - at page 9 commencing on line 24 and at page 10, line 3 - this exempts class B passenger motor carriers that are regulated from the requirement to file an annual report with the Public Service Commission. Why should they be the only class of motor carrier that doesn't have to file an annual report.

(k) New Section 17, Line 28, page 10 - This would require a reissuance without payment of any fee or charge of existing motor carrier certificates for class B passenger carriers - this is an unneeded expense hoisted upon the backs of the Public Service Commission. The certificates would not be changed as to geographical service areas or any of the other factors contained in the grant of authority and is totally unnecessary.

For all of the above reasons and others this bill is really unworkable - covers unnecessary regulatory structures - and should not be passed.

Distributed on behalf of Montana Mountain Express, LTD

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[Title 49, Volume 5]

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TITLE 49--TRANSPORTATION

CHAPTER III--FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION,

DEPARTMENT OF TRANSPORTATION

PART 390_FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL--Table of Contents

Subpart A_General Applicability and Definitions

Sec. 390.5 Definitions.

Unless specifically defined elsewhere, in this subchapter:

Bus means any motor vehicle designed, constructed, and or used for the transportation of passengers, including taxicabs.

Charter transportation of passengers means transportation, using a bus, of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge for the motor vehicle, have acquired the exclusive use of the motor vehicle to travel together under an itinerary either specified in advance or modified after having left the place of origin.

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July 22, 1998

TO: All Interested Persons and Motor Carriers of Passengers

The Montana Public Service Commission (PSC) reports that part of a recent federal enactment, the Transportation Equity Act for the 21st Century, has pre-empted state regulation pertaining to the granting of authorities to provide interstate or intrastate "charter bus transportation." Combined with previous federal pre-emptions related to charter transportation the recent pre-emption renders state economic regulation of charter bus transportation a thing of the past.

Unlike a previous federal pre-emption pertaining to state regulation of rates in "charter transportation," which affected charter services in general, including limousine service, the recent pre-emption is limited to "charter bus transportation." A conference report accompanying the Act makes it clear that the pre-emption is not intended to limit the ability of a state to continue to regulate taxicab service and limousine service.

Interpreting and applying the details of the recent pre-emption may require further analysis. It is possible that future analysis will necessarily be on a case-by-case basis. However, in an effort to produce at least a preliminary opinion on the effect of the recent pre-emption, combining the commonly accepted meaning of "charter," in

the context of "charter bus transportation," with the Act's stated intent that pre-emption not extend to state regulation of taxicab services and limousine services, it is the PSC's opinion that the pre-emption of state regulation of "charter bus transportation" applies to transportation which has all of the following elements:

(a) the transportation is of a group of passengers;

(b) the group of passengers has a common purpose;

(c) the transportation is based on a single contract;

(d) the contract is entered a reasonable time in advance of the transportation and does not result from a spontaneous, "curbside" agreement;

(e) the contract includes a single fixed charge, passenger fares not being assessed individually;

(f) through the contract the group of passengers acquires exclusive use of the motor vehicle;

(g) the transporting motor vehicle is not a limousine;

(h) the group of passengers travels together to a specified destination.

The PSC intends to apply the above opinion as a starting point in responding to inquiries concerning the recent federal pre-emption. The PSC also intends to apply the above opinion as a starting point in any pre-emption related investigation and enforcement pertaining to state motor carrier laws. At this time the PSC does not intend to commence rulemaking or other formal or informal proceedings or inquiries pertaining to the recent pre-emption. However, the PSC is willing to consider comments and requests from any interested persons regarding the need for such further proceedings at this time.